UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

DOUGLAS BROWAND,
Appellant,

v.

DEPARTMENT OF AGRICULTURE,
Agency.

DOCKET NUMBER
SF-0752-12-0400-I-1

DATE: July 19, 2012

Robert W. Donnelly, Chico, California, for the appellant.

Jerry Garcia, Albuquerque, New Mexico, for the agency.

BEFORE
Grace B. Carter
Administrative Judge

INITIAL DECISION

INTRODUCTION

On March 21, 2012, the appellant timely filed a petition challenging the agency's action on February 22, 2012, removing him from the position of Supervisory Forestry Technician (Fire Engine Operator) for violation of a last chance agreement. Initial Appeal File (IAF), Tab 1. A hearing was conducted on June 13, 2012. Hearing Compact Disc (HCD). On May 3, 2012, the agency filed a motion to dismiss for lack of jurisdiction. IAF, Tab 13.[1] For the reasons

[1] By Order dated May 25, 2012, the original version of the agency file dated May 3, 2012 was rejected pursuant to 5 C.F.R. § 1201.14(g)(3). IAF, Tab 19. A properly

discussed below, the agency's motion is GRANTED and the appellant's appeal is DISMISSED for lack of Board jurisdiction.

ANALYSIS AND FINDINGS

Background

On August 12, 2010, while the appellant was serving as a Supervisory Forestry Technician (Fire Engine Operator) with the Santa Barbara Ranger District, Los Padres National Forest, U.S. Forest Service, U.S. Department of Agriculture (USDA), he was interviewed by District Ranger Sherry Tune concerning charges on his government-issued credit card. During the course of the interview, the appellant was questioned about several unauthorized charges on his card. HCD, Browand Testimony. Ranger Tune instructed the appellant to be as forthcoming and as honest as possible during their interview, and the appellant agreed. *Id.* Accordingly, when Ranger Tune asked him about an ATM charge with a cash withdrawal he admitted that this charge was at an ATM machine located at HHWC, an acronym for Helping Hands Wellness Center, a medical marijuana dispensary. *Id.* With the admission of the ATM cash withdrawal, the appellant admitted that he had been using medical marijuana, and shared his prescription with her.[2] *Id.* The interview with Ranger Tune ended shortly thereafter.

Approximately 2 hours later, Acting District Ranger Dana D'Andrea informed the appellant that he was being removed from supervisory duties, and that he was prohibited from performance of certain sensitive duties until further

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bookmarked agency file was submitted on May 30, 2012, and replaced the pleading dated May 3, 2012 in the Board's record. *See* IAF, Tab 13.

[2] The appellant testified that he had used medical marijuana for management of gastritis after experiencing nausea and stomach illness with other medications for some two years prior to this event. HCD, Browand Testimony.

notice. *Id.* The appellant was assigned to answering phones, working at the training center, and doing yard work in the District Ranger Office for approximately 6 weeks. *Id.* On August 19, 2010, the agency issued the appellant a "Direction Prohibiting Your Performance of Safety Sensitive Functions" due to his admission to use of marijuana for treatment of a medical condition. IAF, Tab 13, Subtab 4K. This correspondence advised the appellant of the requirements of Executive Order (E.O.) 12564, and of the necessity for him to complete an evaluation of the need for a treatment or rehabilitation program through the Employee Assistance Program (EAP). *Id.* The appellant was informed that he would not be restored to safety sensitive duties until he completed any recommended treatment or rehabilitation and successfully passed a drug test. *Id.*

On August 27, 2010, the appellant submitted a letter from a Licensed Marriage and Family Therapist, Faith Magdalena, M.A., whom he had located on his own. IAF, Tab 12, Exhibit 1. Ms. Magdalena stated:

> I have assessed Douglas Browand to determine whether or not he has a proclivity to substance abuse. Given his family of origin history, inquiry of past use of substances and recent use to address his medical condition, I believe he does not have a substance abuse problem. This determination is based on my 25 years of experience in working with drug addicts and alcoholics and the information the client provided me. I trust his veracity and feel he is a person of integrity.

Id., Tab 13, Subtab 4I. In response to an inquiry about his fitness for duty, Ms. Magdalena submitted a follow-up e-mail to the appellant's first line supervisor, Douglas Dodge, dated August 31, 2010. *Id.,* Tab 13, Subtab 4H. There, Ms. Magdalena asserted that she thought after her "single assessment" of the appellant, that he was not a danger to himself or others in the context of his job which required "supreme care and attention." *Id.* She concluded by stating "I support your decision to return this gentleman to his regular duties if this be your inclination." *Id.*

On September 23, 2010, Ken Heffner, Deputy Forest Ranger, Goleta, California summoned the appellant to his office, and presented him with a proposal to suspend him from Federal service for 14 calendar days for credit card misuse, and a proposal to remove him from Federal service for use of an illegal drug and for purchase of an illegal drug. *Id.*, Tab 13, Subtab 4G. Mr. Heffner also presented the appellant with a Last Chance Agreement (LCA) with the agency, as an offer to resolve the proposed removal. *Id.*, Subtab 4F. During the meeting with Mr. Heffner, the appellant signed the last chance agreement. *Id.*

The LCA contains language incorporating a decision on the proposed removal, and contains a finding that removal is the appropriate penalty based on the two charges of purchase and use of an illegal drug. *Id.* The LCA provided that the appellant's removal would be abated for a period of 24 months, that the appellant would serve a 30 day suspension, and that he would be allowed to return to his safety-sensitive duties upon presentation of a verified negative drug test result. *Id.* The test was to occur within 10 days of execution of the agreement. *Id.* The LCA required the appellant to submit to unannounced follow-up drug tests as directed by the medical care provider, up to 6 such tests in the first 12 months of the agreement. Furthermore, the LCA provided that "if the results of any drug test . . . shall be verified as positive for use of an illegal drug, the EMPLOYEE's removal will be effected." *Id.* Relevant here, the LCA also contained the following waiver:

> [The EMPLOYEE] [a]grees to waive any and all rights to appeal, grieve, complain, or otherwise contest any and all matters that gave rise to the decision of the removal and all terms of this Last Chance Agreement under the Administrative Grievance Procedure, to the Merit Systems Protection Board, under the discrimination complaint procedures of this Agency and the Equal Employment Opportunity Commission or through any other appellant procedure.

Id. The appellant was returned to duty in his former position after he submitted to drug test and obtained a negative result. HCD, Browand Testimony. He

transferred to another station closer to his home in approximately February 2011, and continued to function as a Fire Engine Captain. *Id.*

The agency conducted no random drug tests in the first year of the LCA. The appellant testified that he injured his back in October 2011 and was prescribed hydrocodone for pain. *Id.* However, he experienced undesirable side effects and recommenced use of medical marijuana. On December 13, 2011, a random drug test was ordered under the Department of Transportation (DOT) regulation at 49 C.F.R. Part 382. IAF, Tab 13, Subtab 4D. On December 20, 2011, Gerry Nagel, the USDA Drug Free Workplace Program Manager, reported to human resources that the appellant had tested positive for marijuana. *Id.,* Tab 13, Subtabs 4D, 4E.

Upon being ordered to submit to the random drug test, the appellant testified that he was "horrified when I realized what I had done," had a panic attack and was in the "midst of a psychiatric crisis." HCD, Browand Testimony. He checked himself into a residential treatment center, Santa Barbara Cottage Hospital, on December 19, 2011. IAF, Tab 12, Exhibit F. He remained in treatment for 28 days, and was discharged on January 16, 2012. *Id.*

On February 22, 2012, Peggy Hernandez, Forest Supervisor, Los Padres National Forest, issued to the appellant a "Notice of Non-Compliance with the Last Chance Agreement and Effected Removal." *Id.,* Tab 13, Subtab 4C. This correspondence advised the appellant that based on the terms of the LCA, his removal was being effectuated immediately. The appellant acknowledged receipt of the correspondence on February 22, 2012. *Id.* This appeal followed.

Upon review of the appellant's petition for appeal, an Acknowledgment Order issued in which he was advised that it did not appear that the Board had jurisdiction over his appeal because of the waiver of appeal rights in the LCA. *Id.,* Tab 2. The appellant was advised that:

> you may appeal only when you make a non-frivolous allegation that: (1) You complied with the agreement; (2) you did not

> knowingly and voluntarily enter into the agreement; (3) the agency materially breached the agreement; or (4) the agreement resulted from fraud or mutual mistake. Breach may be shown both where the agency failed to comply with a provision of the agreement in a way that was material, regardless of its motive, and where it acted in bad faith. *See Link v. Department of the Treasury*, 51 F.3d 1577, 1582 (Fed. Cir. 1995).

Id. The appellant was ordered to respond to the jurisdiction order within 15 days. On April 11, 2012, the appellant filed a response in which he alleged that his waiver of rights was "unknowing and involuntary," that he was denied due process under California state law, and that the implementation of the LCA violated DOT policy. *Id.,* Tab 6. On April 17, 2012, I convened a status conference to discuss the appellant's submissions and gave him an opportunity to supplement his submissions. *Id.,* Tab 8.

On April 23, 2012, the appellant supplemented his jurisdiction submissions. *Id.,* Tab 12. There he based his claim of jurisdiction on allegations that: (1) he was denied the right to consult with an attorney or other representative about the LCA; (2) he was denied an opportunity to respond to the September 23, 2010 proposal to remove him from Federal service; (3) he was not provided a copy of the documentation supporting the September 23, 2010 proposal to remove; (4) the agency committed harmful error under DOT policy prior to offering the appellant a LCA; (5) the agency violated articles of the Master Agreement after his positive drug test on December 13, 2011; (6) he was coerced and under duress when he signed the LCA; (7) his waiver of his Board appeal rights was unknowing and involuntary; and (8) he was entitled to Safe Harbor under the USDA Drug Free Workplace Program. *Id.,* Tab 12 at 3-5.

At a close of record conference on May 24, 2012, I considered the appellant arguments and found that he had made sufficient nonfrivolous allegations supporting the Board's jurisdiction in his allegation that he was denied due process when he was not allowed to seek counsel before signing the LCA, such that he was coerced and under duress when he signed the LCA. The

appellant was afforded a third opportunity to make nonfrivolous allegations supporting his allegation that the Board's jurisdiction could be based on the agency's failure to follow various regulations in the administration of the LCA. I advised the appellant that he "may be alleging an issue such as that discussed by the Board in *Black v. Department of Transportation,* 116 M.S.P.R. 87 (2011)" which may be a nonfrivolous allegation supporting the Board's jurisdiction. *Id.,* Tab 17. I found that his remaining claims were not nonfrivolous allegations which, if true, would confer jurisdiction on the Board.

At the prehearing conference, I again reviewed the appellant's submissions to ascertain if he had made sufficient nonfrivolous allegations supporting the Board's jurisdiction. I found that he had not. The only issue approved for hearing was whether the Board had jurisdiction over his removal based on his nonfrivolous allegation "that he did not voluntarily enter into the last chance agreement because he was denied an opportunity to seek counsel prior to the executing the agreement, and entered the agreement under duress." *Id.,* Tab 24. A hearing was held on June 13, 2012.

Jurisdiction

The Board's jurisdiction is not plenary but is limited to those matters over which it has been given jurisdiction by statute or regulation. *See* 5 U.S.C. § 7701(a); 5 C.F.R. § 1201.3(a); *Garcia v. Department of Homeland Security,* 437 F.3d 1322, 1327 (Fed. Cir. 2006) (*en banc).* The appellant has the burden of proving by a preponderance of the evidence that the Board has jurisdiction over the appeal of his removal. *See* 5 C.F.R. §§ 1201.56(a)(2)(i); *Garcia,* 437 F.3d at 1330. If an appellant makes a non-frivolous allegation[3] of jurisdiction, but a

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[3] Non-frivolous allegations of Board jurisdiction are allegations of fact which, if proven, could establish a *prima facie* case that the Board has jurisdiction over the matter at issue. *See Zordel v. Dept. of Defense,* 99 M.S.P.R. 554, 558 (2005); *Ferdon v. U. S. Postal Service,* 60 M.S.P.R. 325, 329 (1994). In determining whether an appellant has made a non-frivolous allegation of jurisdiction entitling him to a hearing, the

determination cannot be made based on the documentary evidence, the Board should hold an evidentiary hearing to resolve the jurisdictional question. *See Coradeschi v. Department of Homeland Security,* 439 F.3d 1329, 1332 (Fed. Cir. 2006), *citing Garcia,* 437 F.3d 1322.

The Board does not have jurisdiction over an action taken pursuant to a last chance agreement (LCA) in which an appellant waives his right to appeal to the Board. *See Merriweather v. Dept. of Transportation,* 64 M.S.P.R. 365, 375 (1994), *aff'd,* 56 F.3d 83 (Fed. Cir. 1995) (Table). To establish that a waiver of appeal rights in an LCA is unenforceable, an appellant must establish that (1) he complied with the agreement, (2) that the agency breached the agreement, (3) he did not voluntarily enter into the agreement, or (4) the agreement was the product of fraud or mutual mistake. *Lizzio v. Dept of the Army,* 110 M.S.P.R. 442, ¶ 7, *citing Willis v. Department of Defense,* 105 M.S.P.R. 466, ¶ 17 (2007); *Rosell v. Dept. of Defense,* 100 M.S.P.R. 594, 598 (2005), *aff'd,* 191 Fed. Appx. 954, ¶ 7 (Fed. Cir. 2006); *see also Link v. Dept of the Treasury,* 51 F.3d at 1582-83; *Hamiter v. U.S. Postal Service,* 96 M.S.P.R. 511, 515 (2004).

To establish that a LCA was involuntary because of coercion or duress, the Board held in *Bahrke v. U.S. Postal Service,* 98 M.S.P.R. 513, 519 (2005), that

> a party must prove that he involuntarily accepted the other party's terms, that circumstances permitted no alternative, and that such circumstances were the result of the other party's coercive acts. *Candelaria v. U.S. Postal Service,* 31 M.S.P.R. 412, 413 (1986). The fact that an appellant must choose between two unpleasant alternatives, such as signing the LCA or facing immediate removal, does not render his choice involuntary. *See Soler-Minardo v. Department of Defense,* 92 M.S.P.R. 100, ¶ 5 (2002), *review dismissed,* 53 Fed. Appx. 545 (Fed. Cir. 2002); *McCall v. U.S. Postal*

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administrative judge may consider the agency's documentary submissions; however, to the extent that the agency's evidence constitutes mere factual contradiction of an appellant's otherwise adequate *prima facie* showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties and the agency's evidence may not be dispositive. *See Ferdon,* 60 M.S.P.R. at 329.

> *Service,* 839 F.2d 664, 667 (Fed. Cir. 1988). On the other hand, the settlement agreement would be considered involuntary if the appellant demonstrated that the agency knew or believed that its ... proposed removal action could not be substantiated, or that an arguable basis for the proposed removal did not exist. *See Schultz v. Department of the Navy,* 810 F.2d 1133, 1136 (Fed. Cir. 1987); *Fassett v. U.S. Postal Service,* 85 M.S.P.R. 677 ¶¶ 6-8 (2000); *Sullivan,* 79 M.S.P.R. at 85; *Bowie v. U.S. Postal Service*, 72 M.S.P.R. 42, 44-45 (1996), *appeal dismissed*, 129 F.3d 133 (Fed. Cir.1997) (Table).

In the alternative, to show that the agreement was entered into involuntarily, the appellant may show that he lacked the mental capacity to enter into the agreement. *See Briscoe v. Dept of Veterans Affairs,* 63 M.S.P.R. 137, 140 (1994), *citing Wade v. Dept of Veterans Affairs,* 61 M.S.P.R. 580, 584 (1994). "[P]arties to a settlement agreement are presumed to have full legal capacity to contract unless they are under guardianship, an infant, mentally ill or defective, or intoxicated. *See Ray v. Department of Health & Human Services,* 57 M.S.P.R. 16, 20 (1993)." *Wade*, 61 M.S.P.R. at 584.

The Appellant Was Not Denied Counsel or Coerced and Did Not Enter the LCA Under Duress

The appellant testified that he became a seasonal firefighter in 1989 and a permanent firefighter in 1998. HCD, Browand Testimony. He testified that he has associate degrees in Fire Science and Wildland Fire Suppression. *Id.* He maintains certifications as an Emergency Medical Technician (EMT) and as a Wildland Fire Suppression Specialist. *Id.*

The appellant testified he had served in a supervisory position for 4 years at time of the execution of the LCA. *Id.* His responsibilities as a first-line supervisor included ensuring that the certifications for the entire crew were current; planning the day–to-day activities of his crew, documenting training, maintaining mandatory records, supervising wildland fires, mentoring his crew and when necessary disciplining his assigned crew. *Id.* He testified that he has

never had occasion to discipline an employee, and had no recollection of any supervisor-specific training where he learned about the disciplinary process. *Id.*

The appellant testified that Mr. Heffner brought him into his office on September 23, 2010 and read through the proposal to suspend for 14 days, the proposal to remove and the last chance agreement. *Id.* He stated that he disagreed with the agency's decision not to offer him safe harbor[4] which he believed should have resulted in his facing little or no discipline for his admission to illegal drug use. *Id.* He testified that he was shocked that rather than a 15-day or 30-day suspension, he was facing removal. In an unsworn, unsigned statement[5], presented to the Board, the appellant said:

> I asked if I could take the documents with me to look over, and maybe to get someone to look at them for me. I'm not a legal expert and didn't understand some of the language. When I began questioning about how much time I had to sign these documents, Ken Hefner [sic] responded by stating "The offer may not be on the table Tomorrow". I didn't really understand what I was reading. I took an hour or more to go over the Last Chance

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[4] "Safe harbor" refers to provisions under E.O. 12564 and DOT regulations which provide that an employee who self-identifies substance abuse under certain circumstances may not be disciplined for the admitted misconduct. For example, DOT regulations describe the circumstances under which an admission of substance abuse qualifies under the self-identification program, and requires that a qualified voluntary self-identification program or policy must "prohibit the employer from taking adverse action against an employee making a voluntary admission of alcohol misuse or controlled substances use . . . ." 49 C.F.R. § 382.12(a), (b)(1). At the prehearing conference, I found that the appellant did not make a nonfrivolous allegation that he self-identified his substance abuse and was qualified for safe harbor. IAF, Tab 24.

[5] The appellant titled the document "Affidavit of Douglas Browand." IAF, Tab 12, Exhibit A. The document ends "I hereby swear the foregoing is true and correct to the best of my knowledge." *Id.* The document filed with the Board is unsigned. *Id.* The Board has held that an unworn statement by an appellant in an initial appeal file is simply one form of hearsay evidence. *Scott v. Department of Justice,* 69 M.S.P.R. 211, 228 (1995) citing *Borninkhof v. Department of Justice,* 5 M.S.P.R. 77, 83-87 (1981). In general, a sworn statement has greater weight than one that is not. *Id.,* citing *Office of Hearings and Appeals, Social Security Administration v. Whittlesey,* 59 M.S.P.R. 684, 692 (1993).

> Agreement. Because I was not allowed to leave the room, or to take it with me to look at or ask someone about, I had to sign the documents right there. I felt I was being threatened by Mr. Heffner, that he was saying sign now or we'll just fire you. Tomorrow.
>
> I signed the documents even though I did not fully understand what they contained completely. I felt pressure to sign the Last Chance Agreement right then and there while He offered it. I did not realize that I clearly needed counsel before signing these documents or what my rights were.

Id., Tab 11, Exhibit A (as in original). The appellant testified that Mr. Heffner told him that he was offering the LCA, that he didn't have to offer it to him, and that he could rescind the offer at any time, so "I was feeling pressured." HCD, Browand Testimony. However, he admitted that he did not ask any questions of Mr. Heffner concerning the terms of the LCA, the disciplinary process, or the parts "that I did not understand." *Id.* The appellant admitted that while he felt that he could not leave the room without making a decision on the LCA, he did not ask to leave, did not attempt to leave, and was aware of no constraint imposed by Mr. Heffner to keep him in the room. *Id.* The appellant testified that during the time he was alone in the office, he had the documents Mr. Heffner had just read to him, and reviewed them for about an hour. However, he stated that "I don't remember absorbing the material, but I flipped through the documents." *Id.* He testified that he understood that the gist of the documents was that "I was terminated effective immediately." *Id.*

The appellant testified that he asked Mr. Heffner if he could speak to the Forest Supervisor, Ms. Hernandez, to explain his side of the story, and Mr. Heffner told him that he could. *Id.* The appellant testified that he asked Mr. Heffner if he should have someone review all the documents, and that Mr. Heffner responded that he could take time to review them, "but that the LCA may not be on the table tomorrow." *Id.* He testified that he did not know what it meant to respond orally to the proposal to remove, and that he did not ask what it meant. *Id.* Although the appellant admitted that he was aware that one document

was entitled "notice of proposed suspension,[6]" and the other "notice of proposed removal," he testified that he did not understand the distinction between a proposal and a decision. He also testified that he didn't know what a grievance was, did not know he was "signing all my rights away in the future," didn't know what the MSPB was, and didn't know how any of the terms in the agreement pertaining to those rights applied to him. However, he admitted that he did not ask any of the questions he had because he did not feel that Mr. Heffner was approachable. *Id.* The appellant testified that after reviewing the documents, he decided that it seemed clear that he would be signing the LCA "either way" meaning regardless of whether he signed during the meeting or at some later time. *Id.* He admitted that once he reached this conclusion, that he wanted to save his career, he voluntarily signed the LCA. *Id.*

After leaving Mr. Heffner's office, the appellant admitted that he did not read the documents again, did not share them with anyone to attempt to resolve his questions, and never approached anyone in his own management chain about his lingering questions concerning the operation of the LCA. On October 7, 2010, he met with Ms. Hernandez. He wanted to explain his side of the story concerning his medical marijuana use; however, she declined to discuss the issue since he had already signed the LCA, and the matter was closed. At the appellant's request, she did agree to reschedule the suspensions so that they would be served over three pay periods in a 4 month period between October 2010 and January 2011. *Id.;* IAF, Tab 25, Appellant's Hearing Exhibits L, M.[7]

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[6] A decision sustaining the proposed 14-day suspension was received by the appellant on October 13, 2010. This document is not in the record. The appellant stated that he had no recollection of receiving the document, though he acknowledged that it contained his signature as having been received on October 13, 2010. HCD, Browand Testimony.

[7] These two exhibits were submitted by the appellant on the day of hearing, without objection from the agency. *See* HCD, Opening Remarks.

According to Mr. Heffner, he read, in their entirety, the 14-day proposal to suspend, the proposal to remove and the last chance agreement to the appellant. HCD, Heffner Testimony. Contrary to the appellant's recollection, Mr. Heffner attested that he commenced the meeting by informing the appellant that "what I was about to present him was a proposal – not a final action." IAF, Tab 13, Subtab 4A. Mr. Heffner testified that it is his practice in every situation where he presents a disciplinary action directly to the employee to explain the role he is playing (as proposing official or deciding official) and to read through the document, pause, and ask the employee whether or not he has any questions. HCD, Heffner Testimony. He testified that he followed his normal practice in discussing these actions with the appellant. *Id.* After reading the 14-day suspension, he asked the appellant whether he had any questions, and the appellant did not, and then he had him sign the document as having been received on September 23, 2010. *Id.*

In a similar fashion, Mr. Heffner testified he shared the proposal to remove with the appellant, and when he finished reading it, he informed him he was proposing to the deciding official that the agency enter into a LCA with the appellant. *Id.* Mr. Heffner testified that he shared with the appellant that he had received "strong supervisory references" supporting his continued employment which he discussed with the appellant. He recalled asking whether the appellant had any questions about the proposal to remove, and that the appellant had no questions. He testified that he then continued to read the LCA as a "package." He testified that he explained that if both parties agree to the LCA, the appellant's removal would be held in abeyance, he would be returned to safety-sensitive duties, that he would be subject to drug tests during the two year period, and if he failed his removal would be invoked with no appeal rights. *Id.*

Mr. Heffner recalled that the appellant had questions about the LCA. *Id.* He stated that the appellant wanted to know whether Ms. Hernandez had to abide by his recommendation to offer the appellant a LCA, and whether there was a

chance she might not want to offer the LCA. *Id.* He testified that the appellant asked whether he could sign the agreement right then and remove the Forest Supervisor from the process. *Id.* Mr. Heffner reported that the appellant was very remorseful, recognized that what he did was wrong, and stated that he wanted to "get this behind me," "get back to my crew" and "use this as a springboard to push forward." *Id.*

Mr. Heffner testified that the LCA had been prepared for the deciding official's signature, so he left the appellant in the room to go and check with personnel to see if he could enter the agreement that very day. *Id.* After talking with personnel, he returned and against asked the appellant whether he was sure he wanted to enter the LCA, and informed him that if so, he could sign it now. *Id.* The appellant reassured him that he wanted to sign, and signed both the proposal to remove and the LCA. Mr. Heffner testified that he signed the LCA on behalf of Ms. Hernandez. *Id.*

Mr. Heffner testified that he observed the appellant to be "very conciliatory, very understanding, [and] apologetic." He stated that the appellant did not seem to be confused by the documents, asked good questions, and while he was "somewhat nervous" and a "little bit nervous, but not more than that." *Id.* He testified that he was "encouraged by [the appellant's] response, and felt good that [his supervisors'] input was accurate." He testified that the appellant assured him that he would prove to the agency and his crew what a good employee he was.

Mr. Heffner testified that the appellant did not ask for a representative, never said that he didn't understand the terms of the LCA, but rather, when asked, affirmed that he understood. *Id.* Mr. Heffner denied that he told the appellant that the LCA might not be on the table tomorrow. *Id.* He also testified that while the entire meeting with the appellant lasted for more than an hour, he left him alone only 10-15 minutes when he left to obtain direction from personnel about the appellant's desire to sign the LCA immediately. *Id.*

The appellant was not denied representation prior to signing the LCA

The appellant has alleged that he was denied an opportunity to seek counsel prior to signing the LCA. Mr. Heffner denied that the appellant requested representation during the meeting. To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version she believes, and explain in detail why she found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

I find the appellant's allegation that he was denied representation implausible given the circumstances. *Id.* In this case, the proposal letter, which was read in its entirety to the appellant during the meeting, stated:

> You may answer this notice both orally and in writing, submit affidavits and other documentary evidence in support of your answer and be represented by an attorney or other person willing to act as your representative. It is your responsibility to make your own arrangements for representation if you want it. Your selection of a particular representative may be disallowed, if it is determined the representative poses a conflict of interest. You or your representative may review the material relied on to support the reasons for this notice and you will be allowed a reasonable amount of official time to review the material relied on to support this proposal, prepare an answer, secure affidavits, if you are otherwise in an active duty status.

IAF, Tab 13, Subtab 4G. I discern no inadequacy in this notice, and am impressed that Mr. Heffner read the appellant the entire proposal, and left the documents with him so that he could review them after he indicated his interest in signing the LCA. During his time alone, which the appellant believed lasted an

hour, he testified that he flipped through the papers 3-4 times, but did not retain anything. While understandable that when facing the stress of a proposed removal, retaining details of the document would be difficult, I am impressed that the appellant, in the immediate aftermath of signing the LCA, did nothing. The appellant did not complain that he had been denied representation and seek to avoid the LCA. He testified that he did not even review the documents after he signed them, and never sought out counsel or advice after he signed the LCA, until after he faced removal, and found his current representative "16 months later," HCD, Browand Testimony. I find that this behavior is not consistent with behavior typical of an individual who is concerned that he did not understand the documents he had signed. *Hillen, supra,* (a witnesses statement may be credited by its consistency with other evidence). I find therefore, that the appellant was adequately noticed of his right to obtain representation to assist him in responding to the proposal, and that Mr. Heffner did not deny him an opportunity to seek counsel before signing the LCA.

The appellant alleged that the agency coerced him into signing the LCA. The Board has adopted a tripartite test to evaluate an allegation of duress or coercion. The appellant must show the following:

> (1)That one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party. . . .Coercion is present if there is evidence that the appellant was threatened with discharge, the appellant can establish that [he accepted the LCA] to avoid a threatened removal, and if [he] can further show that the agency knew or should have known that the removal could not be substantiated.

Soler-Minardo v. Department of Defense, 92 M.S.P.R. at 104 citing *Myslik v. Veterans Administration,* 2 M.S.P.R. 69, 71 (1980), *O'Connell v. U.S. Postal Service,* 69 M.S.P.R. 438, 444 (1996). In *Soler-Minardo,* the Board noted that involuntariness could be demonstrated by the appellant's reliance on

misinformation in making her decision to accept the agency's offer of settlement, or if the "appellant did not have sufficient time to reflect about her alternative course of action before she was required to make her decision. . . . Unreasonable time constraints have been found to constitute coercion." *Id.* at 105 citing *Scharf v. Department of the Air Force,* 710 F.2d 1572, 1574-75 (Fed. Cir. 1983); *Ryals v. Department of the Army,* 14 M.S.P.R. 409, 412 (1983).

Here, the appellant admitted under cross-examination that his ultimate decision to sign the LCA was voluntary. HCD, Browand Testimony. He stated that he concluded that if he wanted to continue his firefighting career, he would have to either sign the LCA on September 23, 2010, or at someday in the near future. Based on this admission, I find that the appellant's decision to enter the LCA was voluntary. Accordingly, I find that he has not met the first prong of the test, in that he has not shown that his decision to sign the LCA was involuntary.

I briefly address whether the appellant was under unreasonable time constraints when he signed the agreement. I find that he was not. The proposal to remove informed the appellant that he had 15 days[8] to respond to the deciding official concerning the allegations in the proposal. IAF, Tab 13, Subtab 4G. The appellant testified that he felt that he was under compulsion to sign the agreement immediately or lose the opportunity for a LCA. However, he did not ask any questions to confirm his feelings. He did not ask how long he had to think about it; and he did not ask if he could think about it for any period of time. The entire basis for the appellant's belief is his allegation that Mr. Heffner said that the opportunity for a last chance might not be there tomorrow. HCD, Browand Testimony. As previously noted, Mr. Heffner denied that he made this statement. *Id.,* Heffner Testimony.

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[8] This is more than twice the number of days designated as the minimal number of days to respond under the Civil Service Reform Act. *See* 5 U.S.C. § 7513(b)(2) ("a reasonable time, but not less than 7 days. . . .").

I credit Mr. Heffner's denial that he stated the LCA might not be on the table tomorrow. I observed Mr. Heffner's demeanor during his testimony and observed that he was straightforward and direct in his testimony. I did not observe him to be brusque or overbearing, and found him to be concerned that the appellant be properly informed about the discipline he was proposing. He testified that he was surprised when the appellant said that he wanted to get this matter behind him and asked could he sign the agreement now. Unprepared about how to respond, he testified that he went to personnel to confirm that the LCA could be executed immediately. *Id.*

Debra Packard, the agency personnelist, testified consistently with Mr. Heffner when she reported that Mr. Heffner came to her office to inquire about whether it was okay if the appellant signed the agreement right now. *Id.*, Packard Testimony. She testified that she told Mr. Heffner that she saw no reason why the appellant could not sign it that day. Ms. Packard testified that the LCA was already prepared "because it appeared prudent to offer to him at that time" based on the appellant's prior good service record, his reputation as a good performer, and the lack of any indication that he was a substance abuser. *Id.* Moreover, she testified that the LCA contained Ms. Hernandez' signature because it was anticipated that it would be signed during the decision phase. The appellant's statement that he was told that the LCA could be withdrawn "tomorrow" is nonsensical in the context of Mr. Heffner's expressed belief that the appellant was a good candidate to successfully complete the LCA. Therefore, I do not credit the appellant's account of the meeting with Mr. Heffner where he claims he was pressured to sign the LCA immediately or risk immediate removal. Accordingly, I find that the appellant was not coerced or under duress because of unreasonable time constraints to sign the LCA.

The appellant is a long-term Federal employee who has attained supervisory status, but presents himself as lacking understanding of virtually every process associated with the circumstances leading to his removal. I

observed the appellant during his testimony, and did not observe him to be of limited understanding except when it served his ends to declare his ignorance. Accordingly, I do not credit his claims that he was (1) unaware that he had 15 days to file an oral or written reply to the proposal to remove; (2) unaware of the difference between a "proposal" and a "decision;" (3) unaware that he waived his right to appeal an eventual removal for breach; and (4) unaware that he could have left Mr. Heffner's office without signing the LCA.

Finally, throughout these proceedings, the appellant has insisted that the agency knew or should have known that it could not sustain his removal because he was entitled to safe harbor under the USDA and DOT regulations. I address this issue because I allowed the appellant latitude to question Mr. Heffner about this issue during the hearing. The lynchpin of the appellant's argument is that the agency was unaware of his marijuana use prior to his "self-identification" during the interview with Ms. Tune. HCD, Browand Testimony; IAF, Tab 12. Mr. Heffner testified that the appellant's credit card was randomly audited and potential unauthorized charges were uncovered. HCD, Heffner Testimony. He testified that prior to assigning Ranger Tune to conduct the investigation, he noticed the 30-50 charges to "HHWC" and did a "Google" search of the acronym and discovered that it was a marijuana dispensary.[9] *Id.* I credit Mr. Heffner's testimony that the agency had discovered the appellant's purchase of marijuana, prior to his admission on August 12, 2010. With the knowledge of the purchase of marijuana, I find that the agency had a reasonable suspicion of his drug use prior to the August 12, 2010 meeting with Ranger Tune. Thus, I find that the agency did not seek the appellant's removal knowing that it could not be sustained because he was entitled to safe harbor.

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[9] A google search of "HHWC" yields as the first "hit," "Helping Hands Wellness Center –Weed Connection." *See* www.google.com *"HHWC"* accessed on July 16, 2012.

The Appellant was not Denied Due Process When His Removal was Implemented

I *sua sponte* raise the issue of whether the appellant was denied due process when the agency implemented his removal on February 22, 2012. Ordinarily, an appellant is entitled to the minimal due process articulated in the Civil Service Reform Act prior to implementation of an adverse action. The statue requires that an employee receive written notice of the charges 30 days in advance of implementation of a decision, an opportunity to respond to the charges, a right to representation, and issuance of a written decision by the agency. 5 U.S.C. § 7513 (b); *see also Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 542-46, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). The agency issued a "Notice of Non-Compliance with the Last Chance Agreement and Effected Removal" (Notice) on February 22, 2012. IAF, Tab 13, Subtab 4C. The appellant's removal was effectuated the same day. He was not afforded 30 days advance notice of the agency's intended action, or an opportunity to respond to the allegation that he violated the LCA. In the notice, the agency stated:

> You entered into a LCA with the Forest Service due to your admitted use of illegal drugs (marijuana) in 2010. As a condition of the LCA, you were subject to unannounced follow-up drug tests in addition to random Department of Transportation (DOT) testing. As a Supervisory Forestry Technician, you are subject to random drug and alcohol testing due to assigned safety sensitive duties. I find you have failed to comply with the terms and conditions of the Last Chance Agreement by again using illegal drugs.
>
> As part of the LCA, you agreed if the results of any drug tests were verified as positive for the use of an illegal drug, your removal would be effected. You also agreed to waive any and all rights to appeal, grieve, complain or otherwise contest actions relating to the conditions of this Agreement, even if, after execution of this Agreement, removal is imposed because of your failure to satisfy the terms and conditions of this Agreement.

IAF, Tab 13, Subtab 4C. The SF-50 issued by the agency documenting the appellant's removal states that the reason for his removal is "Non-Compliance with Last Chance Agreement." *Id.,* Tab 13, Subtab 4B.

Throughout these proceedings, the agency has treated its Notice as a notice that the removal which was held in abeyance in the LCA was being implemented.[10] Under these circumstances, the appellant would be removed based on the charges in the September 23, 2010 proposal to remove, that is, "Use of an Illegal Drug" and "Purchase of an Illegal Drug." I have already found that the appellant was accorded both advance notice of these charges and an opportunity to respond, although he did not avail himself of the opportunity before signing the LCA.

However, the ambiguous language in the Notice and the language in the SF-50 raise the spectre that the appellant was actually removed based on a charge for which he did not have prior notice, that is, a charge of "violation of the LCA." The Board in *Lockridge v. U.S. Postal Service,* 72 M.S.P.R.613, 619 (1996) *aff'd* 121 F.3d 727 (1997)(unpublished), *cert denied* 118 S.Ct. 1107 (1998), reviewed an agency's attempt to effect a removal for violation of a LCA, and noted the AJ should determine whether the "removal action was a new personnel action and not the reinstatement of the [abated] removal action."

In evaluating whether the action was a new action or imposition of the abated action, the Board considered seven factors in finding that the agency did not reinstate the earlier removal, but removed the appellant based on a new personnel action. Those factors, paraphrased are:

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[10] In his Petition for Appeal and initial jurisdiction pleadings, the appellant complained that he had been denied due process because he was not afforded a pre-termination hearing under *Skelly v. State Personnel Board,* 15 Cal.3d 194, 215 (Cal. 1975) and *Kerry Walls v. Central Contra Costa Transit Authority,* 653 F.3d 963 (9th Cir. 2011). *See* IAF, Tabs 1, 6.

(1) the agency issued a proposed removal affording the appellant 30 days advanced notice in the second action;

(2) the agency afforded the appellant an opportunity to respond to the charge;

(3) the agency stated it was reinstating the earlier removal action;

(4) the violation of the LCA was invoked as the sole basis for the removal action;

(5) the agency issued a decision on the proposed removal which did not refer to the LCA;

(6) the removal decision stated removal was appropriate based on the seriousness of the charges in the second proposed removal; and

(7) the removal decision advised the appellant of his appeal rights

Id. at 619. Applying the factors the Board used in *Lockridge*,[11] I conclude that the agency in this case did not remove the appellant based on a new personnel action, but rather, reinstated the abated removal.

First, the agency did not issue a notice of proposed removal on February 22, 2012 affording the appellant 30 days advanced notice prior to implementing his removal. The notice advised the appellant that pursuant to the terms of the LCA, his removal was being effected immediately. IAF, Tab 13, Subtab 4C. Second, the agency did not afford the appellant an opportunity to respond to the notice of non-compliance before effecting his removal. *Id.* Third, the agency's February 22, 2012 notice did not explicitly state that the September 23, 2010

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[11] I note that in *Lockridge,* the Board concluded that the LCA contained no valid waiver of appeal rights. In a similar case, the Board recently remanded an appeal for an adjudication on the merits an action taken under a last chance agreement which contained no express waiver of Board appeal rights. *Tisberger v. U.S. Postal Service,* CH-0752-11-0086-I-1, Slip Op. at 2-3 (agency proposed removal on a new charge of violation of the LCA, afforded appellant due process and procedural protections under Chapter 75) (non-precedential)(cited for persuasive value). In *Tisberger,* it appears that 5 of the 7 factors noted in *Lockridge* were satisfied: a proposal, an opportunity to respond, no statement that the abated removal was being reinstated, the decision was based on the seriousness of the new charge, and the appellant was afforded notice of his Board appeal rights. Accordingly, I find this case is distinguishable from *Tisberger.*

removal was being effected. *Id.* Fourth, the violation of the LCA, described as the appellant's December 13, 2011 positive drug test, was the sole basis for removal cited in the notice. Fifth, the notice of non-compliance contained numerous (7) specific references to the LCA. *Id.* Sixth, the agency did not evaluate the seriousness of the cited violation of the LCA in the notice, and the notice contained no *Douglas* evaluation of penalty. Finally, in considering the seventh factor, the agency did not advise the appellant of his appeal rights to the Board, but rather notified him that in accord with the LCA, he had waived his appeal rights.

In *Lockridge,* all of the seven factors cited by the Board led to the conclusion that the "second removal action was a new personnel action and not the reinstatement of the first removal action." Here, the response to only one factor would suggest that the first removal action was not being reinstated, that is the failure of the notice to explicitly state that the abated removal was being imposed. This failure was duplicated in the SF-50 documenting the appellant's removal. The Notice stated in the second paragraph, "[a]s you are aware, the LCA was an agreement between you and the Forest Service in lieu of effecting *your removal* from employment as proposed in September 2010." In the portion of the Notice detailing the reason for Ms. Hernandez' decision, she stated "you agreed if the results of any drug tests were verified as positive . . . *your removal* would be effected."

I have thoroughly reviewed the Notice, and find that despite the failure to explicitly state the September 23, 2010 removal decision contained in the body of the LCA was being imposed, the import of the notice's reference to "*your removal*" is a reference to the abeyant removal. I have considered whether the unambiguous language in the SF-50 should control, and I find it does not. The Federal Circuit has long held that in the face of an error on the SF-50, "the SF-50 is not a legally operative document controlling on its face an employee's status and rights." *Grisby v. U.S. Department of Commerce,* 729 F.2d 772, 774-775

(1984)(error on SF-50 could not confer Board jurisdiction over a termination during the probationary period).

Since all of the other factors point only to the conclusion that the agency was effectuating the abeyant removal, I find that rather than a new charge of "violation of the LCA," the agency was effectuating the appellant's removal for the reasons stated in the September 23, 2010 proposal to remove, and incorporated into the September 23, 2010 LCA. Accordingly, the appellant was entitled to no more due process than that which was provided at the time the abeyant removal was effectuated, that is, notice of the reason the removal was being effected. *See Lizzio v. Department of the Army,* 534 F.3d 1376, 1383 (Fed. Cir. 2008) (Due process requires an employee to be given notice of the "way he or she allegedly breached the agreement.").

CONCLUSION

Since I have found that the appellant was not denied representation, coerced or subject to duress in the execution of the LCA, the appellant has failed to meet his burden of showing that this appeal is within the Board's jurisdiction. Moreover, I conclude that the appellant was afforded all the due process to which he was entitled prior to effectuation of the abeyant removal. Accordingly, the agency's motion to dismiss is GRANTED and the appeal is DISMISSED for lack of Board jurisdiction.

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

Grace B. Carter
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **August 23, 2012**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.